86 - 1460

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETER ESPENSCHIED,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETER ESPENSCHIED, pro se
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EDITOR'S NOTE:

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QUESTIONS PRESENTED FOR REVIEW

1. Can the identical law be properly held to have opposite meanings when interpreted for different purposes? Specifically, can the denial of a within-grade increase be held to be both included and excluded from the category of "matters covered under Section 4303" (actions based on unacceptable performance)?

2. Did the Federal Circuit Court of Appeals err by entirely ignoring the evidence that the Merit Systems Protection Board abused its discretion in refusing to waive the time limit for the filing of petitioner's appeal of his removal, where the uncontroverted evidence established that the delay in filing was caused entirely by the agency's misrepresentation of

petitioner's appeal rights?

3. Does exclusion of employees covered by union contracts from the statutory right of appeal of within-grade increase denials constitute an impermissible discrimination between employees and a denial of due process of law?

4. Are within-grade increases so uniformly granted that the denial of such an increase amounts to a taking of property subject to due process of law?

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IN THE
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FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Federal Circuit entered on November 12, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit was filed

on November 12, 1986, Appeal Nos. 86-1004 and 86-1217. The decisions in these cases by the presiding official of the Merit Systems Protection Board, Mr. William L. Garrett, were filed on November 21, 1985, and January 13, 1986, respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The cases involve the due-process provision of the Fifth Amendment to the United States Constitution, and the following sections of Title 5 of the United States Code.

Sec. 4303. Actions based on unacceptable performance. Subsections (a) and(e).

Sec. 5335. Periodic step-increases. Subsection (c).

Sec. 7102. Employees' rights.

Sec. 7121. Grievance procedures. Subsections (a), (b), and (e)(1).

Sec. 7701. Appellate procedures. Subsection (a).

The texts of the cited section and subsections are provided in Appendix D.

STATEMENT OF THE CASE

Petitioner was a Federal employee who had worked at the United States Naval Observatory for 22 years. On June 24, 1985, he was denied a within-grade increase (WGI) and proposed for removal, both for alleged unsatisfactory performance. On July 24, 1985, he was removed, effective August 9. He was notified by the agency that either or both of the actions could be appealed to the Merit Systems Protection Board (MSPB) or grieved through the negotiated procedure. Petitioner has presented evidence to support his claim that the unsatisfactory rating was part of a program of reprisal against him

and three other employees for "whistle-blowing" activities. For reasons described below, he elected to challenge the rating by appealing the WGI denial; he chose not to appeal the removal. At a late stage in the appeal proceedings, he was informed that he had been misinstructed as to appeal rights, viz., that he could have appealed the removal but not the WGI denial. When he then sought leave to appeal the removal, the MSPB refused to allow it, ruling in effect that the petitioner had no available remedy, even though the appeal deadline had passed long before the revelation of misinformation about appeal rights.

The petitioner appealed to the Court of Appeals for the Federal Circuit, seeking relief in the form of (1) reinstatement of his appeal of the WGI denial or, failing that, (2) a finding that the MSPB had abused its discretion in refusing to allow a late appeal of the removal. The Court of Appeals

affirmed the MSPB decisions denying both requests.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS ISSUED SIMULTANEOUS CONTRADICTORY FINDINGS WHICH AFFECT MANY FEDERAL EMPLOYEES, AS TO THE STATUS OF WITHIN-GRADE RAISE DENIALS.

In this matter the Federal Circuit directly contradicted the findings of the Court of Claims in Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl. 1981), and its own subsequent decision in Romane v. Defense Contract Audit Agency, 760 f.2d 1286 (Fed. Cir. 1985), while at the same time affirming those decisions and stating that it had no intent to disturb them. In Meyer the Court of Claims had

expressly held that WGI actions are "inferred to be included within the clause 'an action based on unacceptable performance described in sec. 4303 of this title'", and in Romane the Federal Circuit Court of Appeals expressly adopted that reasoning. Thus the Federal Circuit contradicts itself on a matter of broad application to Federal employees: It (1) recognizes and affirms the Meyer and Romane decisions' reliance on the reasoning that "Congress intended WGI denials to be included" among sec. 4303 actions, and (2) asserts in the same decision that Meyer does not construe sec. 7121(e), which provides for optional appeal by the employee of "matters covered under section 4303", and which the Court now asserts does not include WGI denials. It is surely capricious to maintain that the same action based on unacceptable performance can be included in "an action based on unacceptable performance described in sec.

4303" but at the same time be excluded from the category "matters covered under sec. 4303".

II.

IT IS A PATENT INJUSTICE TO CAUSE AN INDIVIDUAL TO LOSE HIS RIGHT OF APPEAL WHEN HE WAS AFFIRMATIVELY MISLED BY HIS EMPLOYING AGENCY AS TO THE INFORMATION THAT GOVERNED HIS APPEAL DECISIONS.

Both the MSPB and the Court of Appeals failed in their responsibility to consider the interaction of the two cases before them, deciding each one as though the other did not exist. Since the course of action pursued in the dismissal case depended entirely on the events of the WGI denial case, the refusal to examine that interaction (or even to recognize its existence) amounted to an arbitrary exclusion of the primary evidence bearing on

the case.

The question implicitly presented by the total situation was, If petitioner had known that the MSPB would disclaim jurisdiction in the WGI denial case, would he at that time have appealed his removal to the MSPB? If there is any substantial evidence that the answer is Yes, it was surely a flagrant abuse of discretion to deprive the petitioner of his right to appeal a finding against him, when that deprivation derives entirely from an error by the government which the petitioner did not and could not know of.

There is no question that petitioner had no way to be aware of the error in the information he had been given. Further, the record shows clearly that the misinformation was pivotal in petitioner's decision as to his initial course of action in <u>both</u> cases. Petitioner's primary motivation was to obtain review by higher authority of the

wrongful "unsatisfactory" performance rating. His reasoning, as attested in the record, was that an appeal of either the WGI denial or the dismissal could serve that purpose, but that the continuing threat of reprisal made it more prudent to appeal the WGI denial. His decision was based on the combination of two facts: (1) The dismissal for unsatisfactory performance had created eligibility for immediate retirement (because he had over 25 years' service), although he would not have had the option of voluntary retirement (because he had less than 30 years' service). (2) A successful appeal of the dismissal would create the hazard that if he were reinstated he would then be subject to a removal on fabricated disciplinary charges (the method which had been used to remove one of his fellow "whistleblowers"); unlike the performance-based removal, this action would not create eligibility for retirement.

However, petitioner testified that he would have accepted this risk and appealed the removal, if that had been the only way to clear his name and obtain higher review of the corrupted rating process. He has met his obligation to demonstrate good cause for the MSPB to to allow him to appeal his dismissal. Furthermore, even if that demonstration had been less than clear and convincing, the MSPB and the Federal Circuit ignored the Court's own requirement that "any doubt about whether good cause has been shown should be resolved in favor of an appellant." Ceja v. United States, 710 F.2d 812, 814 (Fed. Cir. 1983).

III.

INTERPRETATION OF THE STATUTE DEFINING PERFORMANCE-RELATED ACTIONS THAT CAN BE APPEALED AS A MATTER OF RIGHT, MUST INCLUDE WITHIN-GRADE INCREASE DENIALS; OTHERWISE AN UNCONSTITUTIONAL DISCRIMINATION IS CREATED

AGAINST EMPLOYEES IN ORGANIZED BARGAINING UNITS.

This case raises an issue of due process for "represented" employees. Under 5 U.S.C. sec. 7121(b)(3)(C), there is no opportunity for an affected employee to invoke binding arbitration. Thus in order to reach any deciding authority beyond the management which had taken the action being appealed, the employee is at the mercy of the "exclusive representative" to invoke binding arbitration. In the present case, in which the employee alleges that the management effectively had the allegiance of, or control over, the exclusive representative, the employee had no means of appeal to higher authority available to him, if he could not appeal to the MSPB.

If section 7121 is read as overriding other sections which provide for appeal to the MSPB as a matter of right (such as sections 5335(c) and 7701(a)), an

unconstitutional discrimination is made by section 7121 between those employees who are not subject to representation by an exclusive representative and those who are. The latter, at best, are subjected to the additional hurdle of having to convince the "management" of the exclusive representative to invoke arbitration; and they may not be able to do so (or, the representative or the employee may be financially unable to afford the arbitration). In this case, the employee was faced with a perceived certainty that arbitration would not be made available to him; therefore, under the decision of the Court of Appeals, no avenue of appeal existed for him. By contrast, an employee without an exclusive representative would have had an unhampered avenue of appeal open to him.

No comparable discrimination exists among private-sector employees, since there is no general appeal board to which

employees may appeal their grievances, and the governmental bodies which enforce labor standards laws are equally accessible to organized and unorganized employees. Further, this placing of a special employment handicap on federal employees whose workplace has been organized by a labor union is contrary to the expressed intent of Congress. "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal..." 5 U.S.C. sec. 7102 (emphasis added).

IV.

WITHIN-GRADE INCREASES, BECAUSE OF THE UNIFORMITY WITH WHICH THEY ARE GRANTED, ARE PROPERTY SUBJECT TO DUE-PROCESS SAFEGUARDS.

The Court of Appeals, in disallowing the right of appeal, fails to recognize the character of the WGI as property, and

therefore does not deal with the concomitant issue of denial of due process of law. Withholding of a WGI amounts to a deprivation of property, because although it is not explicitly a taking, it is equivalent to a reduction in salary as a consequence of the near uniformity with which such increases are provided on schedule. An employee who does not receive a WGI is thereby receiving less pay than virtually everyone else who has been doing the same work for the same length of time, and thus has been deprived of, rather than merely not given, that portion of his salary. Such deprivation requires the same unconditional rights of appeal as are provided with the other sanctions of section 4303.

CONCLUSION

For the foregoing reasons certiorari should be granted and the Order of the United States Court of Appeals for the

Federal Circuit dated November 12, 1986 should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETER ESPENSCHIED, Petitioner,	)	Appeal Nos.
v.	)	86-1004
MERIT SYSTEMS PROTECTION BOARD Respondent.	)	86-1217

DECIDED: November 12, 1986

Before MARKEY, Chief Judge, SKELTON, Senior Circuit Judge, and NEWMAN, Circuit Judge.

MARKEY, Chief Judge.

Consolidated petitions for review of two decisions of the Merit Systems Protection Board (MSPB or board). In Appeal No. 86-1004, Peter Espenschied (Espenschied) appeals from the board's decision in Docket No. DC531D8510569, dismissing Espenschied's appeals from Department of the Navy's denial of his within-grade salary increase. We affirm.

In Appeal No. 86-1217, Espenschied appeals from the board's decision in Docket

No. DC04328610081, dismissing as untimely Espenschied's appeal of his removal, 5 C.F.R. Sec. 1201.22(b). We affirm.

BACKGROUND

Peter Espenschied worked for the Department of the Navy (agency) as an astronomer. In May 1985, Espenschied completed the waiting period required for a within-grade salary increase (WGI), a periodic pay raise without change in grade to which federal employees are entitled if their work "is of an acceptable level of competence as determined by the head of the agency." 5 U.S.C. sec. 5335(a). In a June 14, 1985, Performance Rating, the agency determined that Espenschied's performance was unsatisfactory. On June 24, 1985, based on that unacceptable performance rating, the agency denied Espenschied's within-grade salary increase and proposed his removal. The agency sustained the WGI denial in an August 2, 1985 reconsideration decision. On

July 24, 1985, the agency issued a decision approving the proposal to remove Espenschied, effective August 9, 1985.

The reconsideration decision affirming Espenschied's WGI denial contained this description of his appeal rights: "You may appeal my decision to deny you a WGI through the grievance procedure negotiated by the National Federation of Federal Employees Local 1461 and the (agency), or to the Merit Systems Protection Board (MSPB), but not both." Enclosed with the reconsideration decision was an MSPB appeal form. The decision approving the proposal to remove Espenschied contained a similar description of his appeal rights.

As Espenschied stated in a later affidavit, he "wish(ed) to have an MSPB determination that would clear my record of the wrongful stain of unsatisfactory performance." Because the WGI reconsideration decision and the removal

decision contained similar descriptions of his appeal rights, Espenschied believed he could obtain an MSPB hearing by appealing either or both actions. Espenschied realized that his removal made him eligible for an immediate annuity, so he chose to appeal only the WGI denial.

A. Appeal of the Within-Grade Salary Increase Denial.

On August 22, 1985, Espenschied filed a timely appeal of the WGI denial to the board. The agency responded, discovery proceeded, and a hearing was scheduled.

Not until November 15, 1985, at a pre-hearing conference, did the agency question whether the board had jurisdiction. The agency cited as the basis for its concern National Treasury Employees Union v. Cornelius 617 F. Supp. 365 (D.C.D.C. 1985), a July 1985 decision in which the United States District Court for the District of Columbia held that, where a negotiated

grievance procedure covering WGI denials was available, MSPB review was not. The court declared invalid an Office of Personnel Management (OPM) regulation providing MSPB appeal rights from all WGI denials, whether covered under negotiated grievance procedures or not. OPM revoked its previous rulemaking and published regulations conforming to the Court's order in a Federal Register notice dated October 31, 1985. The agency also cited Moreno v. Merit Systems Protection Board, 728 F.2d 499 (Fed. Cir. 1984), in which this court held that the board lacked jurisdiction to review a WGI denial where a collective bargaining agreement by its terms made a grievance procedure the sole avenue of review.

The presiding official issued a decision dismissing Espenschied's WGI appeal on November 21, 1985. That decision stated, "The Board's regulations provide that, except for certain actions not pertinent

here, employees may not appeal a matter covered by a collective bargaining agreement. 5 C.F.R. sec. 1201.3(b)". The decision then examined the collective bargaining agreement between Espenschied's union and the agency, and concluded that WGI denials were covered under its negotiated grievance procedure.

B. Appeal of Removal.

Six days after the presiding official dismissed Espenschied's WGI appeal, on November 27, 1985, Espenschied appealed his removal to the MSPB. Espenschied argued that the agency's misrepresentation of his WGI appeal rights constituted "good cause" for waiving the 20-day time limit for appealing his removal.

In a January 10, 1986 decision, the presiding official dismissed Espenschied's removal appeal. The presiding official found that, although the agency had misrepresented Espenschied's WGI appeal

rights, it had properly advised him about his rights to appeal the removal. The presiding official ruled that Espenschied had shown no good cause for waiving the time limit for appealing his removal.

The presiding official's decisions on both appeals became final decisions of the board, and Espenschied appealed to this court.

ISSUES

(1) Whether the board erred in dismissing for lack of jurisdiction Espenschied's denial of his within-grade salary increase.

(2) Whether the board abused its discretion in dismissing as untimely filed Espenschied's appeal of his removal.

OPINION

A. Denial of Within-Grade Increase

In general, if an employee is covered by a collective bargaining agreement, matters that customarily would be within the board's

jurisdiction are deemed to be covered by the negotiated grievance procedure and thus beyond the board's jurisdiction, unless the collective bargaining agreement specifically excludes a matter from application of the grievance procedure. 5 U.S.C. sec. 7121(a); 5 C.F.R. sec. 1201.3(b)(1); Bonner v. Merit Systems Protection Board, 781 F.2d 202, 204 (Fed. Cir. 1986); see Moreno v. Merit Systems Protection Board, 728 F.2d 499 (Fed. Cir. 1984). For certain matters, however, employees have an option of either using the negotiated grievance procedure or appealing to the board. 5 U.S.C. sec. 7121(e); 5 C.F.R. sec. 1201.3(b)(1). The question presented here is whether a denial of a within-grade increase is a matter for which employees have that option. The board held that it was not. We agree.

The statutory section stating the general prohibition against board review of matters covered under a negotiated grievance

procedure is 5 U.S.C. sec. 7121(a)(1):

> ... any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

Subsection (e) (5 U.S.C. sec. 7121(e)) states exceptions to the general prohibition:

> (1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the (MSPB) appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. ...

The regulation on which the board relied in dismissing Espenschied's WGI appeal, 5 C.F.R. sec. 1201.3(b)(1), incorporates the statutory jurisdictional limitations:

> Where an employee is covered by a collective bargaining agreement which provides for an exclusive negotiated grievance procedure for actions involving discrimination under 5 U.S.C. 7702, reduction in grade or adverse actions under either 5 U.S.C. 4303 or 7512, the

> employee may raise the matter under either the negotiated grievance procedure or under the Board's appellate procedures but not both. Other matters which are covered by a negotiated grievance procedure under 5 U.S.C. 7121 may not be appealed to the Board.

Espenschied argues that WGI denials are matters covered under 5 U.S.C. sec. 4303, and thus, under 5 U.S.C. 7121(e) and 5 C.F.R. sec. 1201.3(b)(1), they may be raised to the board despite the availability of a negotiated grievance procedure. Section 4303 sets out the procedures an agency must follow to reduce in grade or remove an employee for unacceptable performance. Although section 4303 does not mention performance-based denials of salary increases with no reduction in grade, Espenschied argues that, under Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl. 1981), WGI denials arise under section 4303.

In Meyer, one of our predecessor courts held that the standard of review in WGI

appeals before the MSPB should be "substantial evidence" under 5 U.S.C. sec. 7701(c)(1)(A). 666 F.2d at 545. To reach that holding, the court reasoned that, in section 7701(c)(1), Congress intended WGI denials to be included within the clause "an action based on unacceptable performance described in section 4303 of this title." 666 f.2d at 544. This court has recently reaffirmed the holding in Meyer. Romane v. Defense Contract Audit Agency, 760 F.2d 1286, 1288 (Fed. Cir. 1985).

There is no indication that a negotiated grievance procedure was available to the employee in Meyer. Because the board has jurisdiction to review WGI denials where no grievance procedure exists, the board's jurisdictiOn was not at issue in Meyer. The Meyer court did not construc 5 U.S.C. sec. 7121, the section at issue here. Hence Meyer does not apply in this case.

Our analysis of section 7121 begins with

the assumption that, "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." Andrus v. Glover Construction Co., 446 U.S. 608 (1980). Espenschied cites nothing in the legislative history of section 7121 suggesting that Congress intended to except WGI denials from the general prohibition against board jurisdiction where a negotiated grievance procedure is available. The Conference Report suggests the contrary: "(E)xcept for certain specified exceptions, an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures rather than the agency procedures available to other employees not covered by an agreement." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157, reprinted in 1978 U.S. Code Cong. & Ad. News 2860, 2891 (emphasis added). The

Senate Report sheds light on those "specified" exceptions: "Subsection (e) provides employees with an option, in appealing matters covered under 5 U.S.C. section 4303 (demotion or removal for unacceptable performance) ..., of using the statutory appeal procedure under 5 U.S.C. section 7701 or the negotiated grievance procedure if such matters have been negotiated into coverage under the grievance procedure." S. Rep. N. 969, 95th Cong., 2d Sess. 110, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2832 (emphasis added).

Espenschied argues that, because the statutory section governing WGI appeals (5 U.S.C. sec. 5335(c)) does not limit an employee's right to appeal to the board, section 7121 cannot. That argument fails because the legislative history of section 7121 plainly indicates that Congress intended negotiated grievance procedures, where available, to override statutory

appeal procedures. National Treasury Employees Union v. Cornelius, 617 F. Supp. 365, 370 (D.C.D.C. 1985); see Bonner, 781 F.2d at 204. The Senate report states:

> (I)f the parties choose to do so, they may negotiate into coverage under their grievance procedure many of the matters that are covered by statutory appeal procedures, such as appeal from the withholding of within-grade salary increases and appeal from reduction-in-force actions. With the exception of adverse actions and discrimination complaints, where a grievance falls within the coverage of the negotiated grievance procedure, both union and nonunion members of the bargaining unit must use the negotiated procedure to resolve the grievance.

S. Rep. No. 969, 95th Cong., 2d Sess. 109-10, reprinted in U.S. Code Cong. & Ad. News 2723, 2831-32.

Espenschied argues that the Board erred in retroactively applying OPM's October 31, 1985 regulation to Espenschied's August 22, 1985 appeal. However, the regulation on the books at the time Espenschied filed his appeal, and which Espenschied would have the board apply, was declared invalid before the

agency issued its reconsideration decision denying Espenschied's within-grade salary increase. National Treasury Employees Union, 617 F. Supp. at 372. That the agency relied on an invalid regulation in advising Espenschied of his appeal rights is unfortunate, but does not invoke the board's jurisdiction. An invalid regulation cannot confer jurisdiction.

B. Removal

Espenschied argues that the board abused its discretion in dismissing his removal appeal as untimely. To establish "good cause" for waiving the time limit for filing that appeal, Espenschied submitted an affidavit to the board in which he stated that he would have filed a timely appeal of the removal had not the agency misinformed him about his rights to appeal the WGI denial.

The board found that Espenschied had shown no good cause because the agency had properly advised him about his right to

appeal the removal decision, and that Espenschied had chosen not to appeal. Substantial evidence supports that finding. We cannot "conclude that the agency's actions and statements could have misled a reasonable person" about Espenschied's removal appeal rights. Yuni v. Merit Systems Protection Board, 784 F.2d 381, 385 (Fed. Cir. 1986).

We note that the board's ruling that it lacked jurisdiction to hear Espenschied's appeals did not deprive Espenschied of the opportunity to challenge the agency's determination of inadequate job performance. The agency offered to waive the time limit governing Espenschied's filing of a grievance of his WGI denial, thereby affording him the opportunity to grieve that denial. Espenschied did not avail himself of that opportunity, however.

CONCLUSION

Because the board properly found that denials of within-grade salary increases covered under a negotiated grievance procedure may not be appealed to the board, the board did not err in dismissing for lack of jurisdiction Espenschied's appeal of the denial of his within-grade salary increase. 5 U.S.C. sections 7121(a)(1), (e)(1); 5 C.F.R. sec. 1201.3(b)(1). The board did not abuse its discretion in dismissing as untimely Espenschied's appeal of his removal. We affirm both of the board's decisions.

AFFIRMED

APPENDIX B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

PETER ESPENSCHIED, appellant	)	CASE NUMBER DC531D8510569
v.	)	DATE: NOV 21 1985
DEPARTMENT OF THE NAVY, agency.	)	WILLIAM L. CARRETT PRESIDING OFFICIAL

DECISION

Appellant filed an appeal from the agency's reconsideration decision sustaining a denial of his within-grade salary increase. 5 U.S.C. sec. 5335(c); 5 C.F.R. sec. 531.410(d). For the reasons to follow, the appeal is DISMISSED. 1/

In its reconsideration decision, the agency advised appellant that he could appeal the action through the agency's grievance procedures or to the Board, but not both. The appellant elected to appeal

to the Board. The agency, relying upon National Treasury Employees Union v. Cornelius, No. 85-0129 (D.D.C., decided July 15, 1985) and Moreno v. Merit Systems Protection Board, 728 F.2d 499 (Fed. Cir. 1984), requested dismissal of the appeal for lack of Board jurisdiction. 2/

The Board's regulations provide that, except for certain actions not pertinent here, employees may not appeal a matter covered by a collective bargaining agreement. 5 C.F.R. sec. 1201.3(b); Moreno v. Merit Systems Protection Board, supra.

Article 12 of the collective bargaining agreement between the agency and Local 1461, National Federation of Federal Employees, provides for "Grievance Procedure". Ag. File, Tab 8. Article 12.1 defines the word "grievance" to mean "any complaint" filed by an employee or the union "concerning any matter relating to the employment of (an) employee" or "any alleged violation,

misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." Article 12.1(d) specifically excludes certain matters from coverage, but a denial of a within-grade pay increase is not one of them. Nor do the definitions contained in Article 20, providing for "Disciplinary and Adverse Actions" and the right of further appeal to the Board, include denials of within-grade pay increases.

I find no evidence that the collective bargaining agreement specifically excludes denials of within-grade pay increases from the definition of the word "grievance". I conclude, therefore, that the negotiated grievance procedure is the exclusive forum for agency employees seeking relief from such actions. Moreno v. Merit Systems Protection Board, supra. Appellant argued that the agency should be estopped from filing its motion since it advvised

appellant that one of his options was to appeal to the Board. Although the agency's advice was erroneous, it is insufficient to confer Board jurisdiction over a nonappealable matter. Powell v. Department of the Army, 8 MSPB 572 (1981). Accordingly, appellant's petition is DISMISSED.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on Dec. 26, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. sections 1201.113 and .117 (1985).

(Review and appeal instructions omitted)

Footnotes:

1/ The agency orally moved to dismiss this appeal at a prehearing conference held on November 15, 1985, at which certain

procedural matters were discussed, including the filing of interlocuttory appeals and other available relief. Upon reviewing the agency's documentary evidence (Appeal File, Tab 25), I found that its motion was well supported. On November 18, 1985, in the light of pending discovery orders and the scheduled hearing, I advised the parties in a telephone conference call of my preliminary decision on the agency's motion.

2/ The agency did not make its motion sooner because only recently did it become aware of National Treasury Employees Union v. Cornelius, supra. That decision enjoined the Office of Personnel Management (OPM) from amending 5 C.F.R. sec. 531.410(d) to provide appeal rights to the Board from denials of within-grade pay increases, even though a collective bargaining agreement may provide that its negotiated procedures will be the exclusive remedy. It was not until October 31, 1985, did OPM, in accordance with the Court's decision, publish formal regulations revoking its previous rulemaking. 50 Fed. Reg. 45389 (October 31. 1985).

For the Board: /s/ WILLIAM L. GARRETT
Presiding Official

APPENDIX C

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

PETER ESPENSCHIED, appellant	)	CASE NUMBER DC04328610081
v.	)	DATE: JAN 13 1986
DEPARTMENT OF THE NAVY, agency.	)	WILLIAM L. GARRETT PRESIDING OFFICIAL

INTRODUCTION

Appellant filed an appeal on November 27, 1985, from the agency's action separating him from his position of Astronomer, effective August 9, 1985, for unsatisfactory work performance. Since appellant filed his appeal more than twenty days after the effective date of his removal, he was ordered to show cause why it should not be dismissed for untimeliness. 5 C.F.R. sections 1201.22, .56(a)(2).

On July 24, 1985, the agency issued a decision removing the appellant for

unsatisfactory work performance. On August 2, 1985, the agency issued a decision withholding his within-grade salary increase (WGI), and appellant appealed the WGI action to the Board. I dismissd the appeal because I found that the agency's negotiated grievance procedure was the exclusive forum for such actions. 1/ In light of my decision, appellant filed the instant petition challenging his removal. For the reasons to follow, the petition is DISMISSED.

ANALYSIS AND FINDINGS

I must exercise my judgment to determine whether applicant has presented facts which reasonably excuse his failure to file a timely appeal. Alonzo v. Department of the Air Force, 4 MSPB 262 (1980); 5 C.F.R. sec. 1201.22. Appellant represents that the agency misinformed him about his right to appeal the withholding of his WGI, and that under relevant Board decisions, the

misrepresentation constitutes good cause for waiving the time limit. See Cohen v. Department of Labor, 20 M.S.P.R. 232 (1984); Butler v. Department of Interior, 3 MSPB 534 (1980).

Appellant bases his argument on National Treasury Employees Union v. Cornelius, No. 85-0129 (D.D.C., decided July 15, 1985). There, the Court enjoined the Office of Personnel Management (OPM) from amending 5 C.F.R. sec. 531.410(d) to provide appeal rights to the Board from WGI denials, even though an agency's negotiated procedure may be the exclusive remedy. OPM's regulations conflicted with Board procedures governing appeals of actions covered by a collective bargaining agreement. See Moreno v. Merit Systems Protection Board, 728 F.2d 499 (Fed. Cir. 1984); 5 C.F.R. sec. 1201.3(b). Since OPM did not revoke its regulations until October, 1985, 2/ the agency erroneously advised appellant that he could appeal the

withholding of his WGI to either the Board or through its negotiated procedure. Appellant contends that had the agency not misrepresented his right to appeal the WGI, he would have appealed the removal action.

I have carefully considered appellant's argument and I find that he has not established good cause for the delay in filing this appeal. The agency misrepresented appellant's appeal rights concerning the WGI. He does not argue that the agency misinformed him about his right to appeal the removal, and I find no evidence that it did. Thus, the cases relied on by appellant are distinguishable from the facts of this case because the misrepresentation involved related to the action that formed the basis of the appeals. Cohen v. Department of Labor, supra; Butler v. Department of Interior, supra. See also Alonzo v. Department of the Air Force, supra. Here, the removal decision was

issued approximately nine days before the agency's decision on the WGI. Both were independent agency proceedings and, although they may have rested on common facts, appellant had the right to appeal not one or the other but both. I find that the agency properly advised appellant about his right to appeal its decision removing him. This, he chose not to do.

Accordingly, I find that appellant has not shown good cause for waiving the time limit for filing this appeal. Alonzo v. Department of the Air Force, supra.

DECISION

Appellant's petition is hereby DISMISSED.

REVIEW RIGHTS

This is an initial decision and will become a final decision of the Merit Systems Protection Board on Feb. 17, 1986, unless a petition for review is filed by that date or the Board reopens the case on its own

motion. 5 C.F.R. sections 1201.113 and .117 (1985).

(Review and appeal instructions omitted)

Footnotes:

1/ Espenschied v. Department of the Navy, Case Number DC531D8510569 (November 21, 1985). Thereafter, the agency advised appellant that it would extend the time limit for filing a grievance on the withholding of his WGI. Appeal File, Tab 3 (Enclosure 4).

2/ See 50 Fed. Reg. 45389 (October 31, 1985).

For the Board: /s/ WILLIAM L. GARRETT
Presiding Official

APPENDIX D

TEXTS OF CITED STATUTES
United States Code, Title 5

Sec. 4303. Actions based on unacceptable performance.

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Sytems Protection Board under section 7701 of this title.

Sec. 5335. Periodic step-increases.

(a) An employee paid on an annual basis, and occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for

the grade in which his position is placed, shall be advanced in pay successively to the next higher rate within the grade ... subject to the following conditions: ... (B) the work of the employee, except an administrative law judge appointed under section 3105 of this title, is of an acceptable level of competence as determined by the head of the agency.

(c) When a determination is made under subsection (a) of this section that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of that determination within his agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is confirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection

Board. If the reconsideration or appeal results in a reversal of the earlier determination, the new determination supersedes the earlier determination and is deemed to have been made as of the date of the earlier determination. ...

Sec. 7102. Employees' rights.

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. ...

Sec. 7121. Grievance procedures.

(a)(1) Except as provided in paragraph (2) of this subsection. any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in

subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage. (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall-- (1) be fair and simple, (2) provide for expeditious processing, and (3) include procedures that-- (A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances; (B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance

proceeding; and (C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(e)(1) Matters covered under 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised under either the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee

shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

Sec. 7701. Appellate procedures.

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right-- (1) to a hearing for which a transcript will be kept; and (2) to be represented by an attorney or other representative. Appeals

shall be processed in accordance with regulations prescribed by the Board.